

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)	In Proceedings
J. LLOYD TOMER and)	Under Chapter 7
CHRISTINE TOMER,)	
)	BK No. 89-40634
Debtors.)	
)	
TAMALOU WILLIAMS, Trustee,)	
)	
Plaintiff,)	
)	
v.)	ADVERSARY NOS.
)	90-0043
J. LLOYD TOMER, MASSACHUSETTS))	90-0044
INDEMNITY AND LIFE INSURANCE))	90-0045
COMPANY (MILICO), THE A.L.))	
WILLIAMS CORPORATION, A.L.))	
WILLIAMS & ASSOCIATES, INC.,))	
MAPLELEAF INSURANCE SERVICES,)))	
INC., FIRST AMERICAN NATIONAL))	
SECURITIES, INC. (FANS), ALW))	
MARKETING CORPORATION, AND))	
MAPLELEAF INSURANCE SERVICES,)))	
L.P.,))	
)	
Defendants.))	

Opinion

In its order and opinion of June 19, 1991, this Court denied the motion of debtor J. Lloyd Tomer for summary judgment on the trustee's complaint for declaratory relief and entered judgment for the trustee. Upon review of the debtor's contracts governing his entitlement to commissions from the defendant companies, the Court found that insurance commissions attributable to policy applications submitted by the debtor prepetition that became earned by the payment of premiums postpetition were property of the debtor's bankruptcy estate to be paid over to the trustee. The Court, accordingly, directed the MILICO defendants to file an accounting of commissions attributable to

prepetition policies

that had been withheld in excess of the debtor's liability to the company defendants or that had been paid to the debtor postpetition so that the trustee could take appropriate action to recover such amounts. See In re Tomer, 128 B.R. 746, 762-63 (Bankr. S.D. Ill. 1991).

After a hearing on July 17, 1991, the Court denied the debtor's motion for reconsideration of its summary judgment ruling and directed the debtor to submit a proposed order concerning turnover of the commissions attributable to prepetition policies that had been found to be property of the bankruptcy estate. In a written objection to the proposed order of turnover, the debtor asserted that turnover was procedurally inappropriate as a means of enforcing the Court's order on the trustee's declaratory judgment complaint, contending that a separate turnover action was required instead. The debtor further asserted that significant factual issues remained concerning the turnover of funds by the debtor which necessitated a hearing to determine the nature and extent of vested commissions to be turned over to the trustee pursuant to the Court's order.

On July 30, 1991, the MILICO defendants filed their responses to the Court's order of June 19, 1991, setting forth the amount of commissions that had been withheld postpetition on prepetition policies of the debtor and his downline hierarchy; the amount of the debtor's liability to the companies that existed on the date of his bankruptcy filing; and the amount of commissions attributable to prepetition policies that had been paid to the debtor postpetition. The debtor objected to the MILICO defendants' responses, asserting that "to the

extent the Court's determination of commissions 'attributable to' prepetition policies and renewals thereof is not based upon the debtor's contracts, substantial issues of fact and law remain as to the trustee's right to turnover of the commissions . . . by the MILICO defendants or the debtor." (Emphasis added.)

On September 25, 1991, the Court heard arguments on the debtor's objection to turnover and the debtor's objection to the MILICO defendants' responses, along with the trustee's own objection to the MILICO responses in which she took issue with the companies' calculation of charges made to the debtor's commissions. At the conclusion of the hearing, the Court directed the parties to submit briefs outlining their respective positions of what the proper distribution should be under the Court's order of June 19, 1991. The Court advised the parties to include in their briefs a description of any remaining fact issues which would preclude turnover of the amounts found to be property of the estate pursuant to the Court's summary judgment order. The debtor subsequently filed his "Brief in opposition to Proposed Turnover of Post-Petition Proceeds," which is presently before the Court for consideration in ruling on the debtor's objection to turnover and objection to MILICO defendants' responses.¹

¹The trustee filed her own "Brief Submitted on What Proper Distribution Should be Pursuant to Court's Order of September 25, 1991." The trustee's brief alleges that a discrepancy exists between the trustee and the MILICO defendants in calculating the debtor's roll-up liability to the companies, which affects the amount of commissions that are payable to the trustee as property of the estate under the June 19, 1991, order. The Court, pursuant to the MILICO defendants' motion, has stayed further action on the trustee's brief based on the representation that the parties will attempt to resolve the perceived discrepancy in the computation of damages. See order

The Court first addresses the preliminary issue of whether a turnover order is procedurally appropriate as a means of enforcing its order of June 19, 1991, on the trustee's complaint for declaratory relief. The debtor contends that because the trustee did not include a count for turnover in her declaratory judgment complaint, she must now file a separate adversary proceeding to effect turnover of the debtor's commissions found to be property of the estate.

A turnover action under 11 U.S.C. § 542 is a means for determining whether particular property sought by the trustee is property of the estate. Section 542(a) specifically states that an entity holding such property "shall deliver" it to the trustee, thereby authorizing the trustee to obtain estate property that is in the possession of a party other than the debtor. A debtor holding property of the estate, however, has the statutory duty to surrender it to the bankruptcy trustee pursuant to 11 U.S.C.

§ 521.² Where, as in the instant case, there has been a determination that particular property constitutes property of the estate, a debtor

entered December 6, 1991.

²Section 521 provides in pertinent part:

The debtor shall--

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate

11 U.S.C. § 521(3), (4).

has no prerogative to insist that the trustee pursue the formal procedure of a § 542 turnover action to obtain estate property held by the debtor. Cf. In re Sowers, 97 B.R. 480 (Bankr. N.D. Ind. 1989): debtor's counsel who conceded that contents of 401(k) plan were property of estate but nevertheless refused to have property turned over to trustee without formal turnover proceeding vexatiously multiplied proceedings, justifying imposition of sanctions.

The trustee's declaratory judgment action here sought a determination that commissions which the debtor was entitled to receive for insurance policies submitted prior to petition date were property of the estate. Both the debtor and the trustee filed motions for summary judgment in their favor based on the language of the contracts. At hearing on the motions for summary judgment, both parties conceded that there was no issue of fact as to liability under the contracts. The parties represented that once the Court made a determination concerning entitlement to the commissions, the amount of damages could be calculated--presumably from the records and payment schedules of the company defendants. The Court, accordingly, conducted a bifurcated hearing on the issue of the parties' liability under the contracts and found that commissions attributable to policy applications submitted by the debtor prepetition were property of the estate.

Since the question of property of the estate has already been determined in the trustee's declaratory judgment action and since § 521 requires the debtor to turn over property of the estate to the trustee, it would serve no purpose for the trustee to file a separate turnover proceeding to accomplish this result. For this reason, the Court

rejects the debtor's contention that the proposed order of turnover is inappropriate on procedural grounds.

The debtor argues further that there are significant issues of fact remaining as to the nature and extent of damages under the Court's June 19, 1991, order, so that an evidentiary hearing is required before turnover may be entered in enforcement of this order. The debtor notes that he has continued to perform under his contracts with the companies in the postpetition period and asserts that business expenses incurred in servicing policyholders who were first solicited in the prepetition period should be deducted from prepetition renewal commissions to be paid over to the trustee. Specifically, the debtor observes that he continues to maintain a fully-equipped and staffed office; he continues to resolicit policyholders in order to maintain persistency levels; and he continues to supervise and train a network of independent agents. The debtor asserts that these overhead, staffing, training, recruitment, and persistency expenses are related to servicing clients and policies upon which commissions will be paid to the trustee under the Court's order. He maintains, therefore, that a fact determination must be made concerning what portion of renewal commissions on prepetition policies, which were found to be property of the estate under the Court's order, are actually postpetition earnings excluded from property of the estate pursuant to § 541(a)(6).

At the summary judgment hearing on the liability issue, the debtor vigorously argued that renewal commissions paid on prepetition policies in the postpetition period were excluded from property of the estate under § 541(a)(6) as "earnings from services performed by (the debtor)

after the commencement of the case." See In re Tomer, 128 B.R. at 760-61. The Court rejected this argument, finding that renewal commissions to which the debtor became entitled prior to filing that continue to be paid on prepetition policies subsequent to bankruptcy constitute property of the estate. The Court specifically noted that there was no requirement that the debtor perform postpetition services "to gain the greatest possible payout and renewal of prepetition policies and so enhance the value of the debtor's property interest in vested commissions." 128 B.R. at 761.

Having received an adverse ruling on the exclusion of commissions on prepetition policies under § 541(a)(6) in the liability portion of this case, the debtor may not now relitigate this issue in objecting to the determination of damages. To the extent, however, that the debtor has performed services or incurred expenses that serve to maintain or preserve property of the estate, i.e., by securing payment of renewal commissions to which the debtor became entitled prior to filing under the terms of the contracts, he would have a valid claim for administrative expenses under 11 U.S.C. § 503(b).³ The debtor may, therefore, file a claim for administrative expenses and present evidence concerning the value of his postpetition services and costs in maintaining property of the estate. It is the debtor's burden to prove entitlement to administrative expenses, however, and he may not shift

³Section 503(b) provides for allowance of administrative expenses including "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case[.]" 11 U.S.C. § 503(b)(1)(A).

this burden to the trustee as part of the trustee's action to obtain possession of property of the estate.

The debtor additionally raises numerous alleged issues of fact concerning the enforcement of an order requiring turnover of renewal commissions on prepetition policies that were found to be property of the estate.⁴ This line of questions asks the Court to speculate as to the consequences of events that might occur in the future. For example, the debtor seeks a determination of who would be the real party-defendant in case of a default in commission payments by the companies; whether the trustee has standing to compel arbitration regarding the parties' rights and duties under the debtor's contracts; whether the trustee could contest an arbitrary decision by the companies to transfer his downline agents or his prepetition policyholders to other RVP'S; and whether the trustee would have any recourse in the event the debtor encouraged policyholders to cancel MILICO policies or the companies chose to divest the debtor of all rights to payment of commissions arising from prepetition policies.

It is evident that these supposed fact issues are premised on events that have not occurred. Resolution of these issues would require the Court to render an advisory opinion on matters that are not properly before it. The Court finds nothing in the debtor's recitation

⁴The debtor erroneously characterizes such commissions as Postpetition renewal commissions, presumably because they are paid in the postpetition period as policyholders actually make their renewal premium payments. As discussed in the Court's opinion and order of June 19, 1991, the debtor's right to such renewal commissions arose in the prepetition period when the policy applications were submitted by the debtor.

of "remaining fact issues" that would preclude entry of a turnover order to effectuate its summary judgment order concerning property of the estate.

To some extent, the debtor's objections to turnover in this case stem from his disagreement with the Court's ruling in the liability portion of the case regarding the trustee's entitlement to renewal commissions on prepetition policies. The debtor continues to argue that the Court incorrectly interpreted his contracts with the companies, as in his objection to the MILICO defendants' responses where he states that the Court's determination of commissions attributable to prepetition policies was "not based on the debtor's contracts." He also raises issues regarding vesting and the "request to pay" under § 7C that were thoroughly considered by this Court in rendering its decision. Certainly, such issues relating to liability under the debtor's contracts present no obstacle to the Court's entry of an order setting forth the amount of prepetition commissions to be turned over to the trustee pursuant to its order and opinion of June 19, 1991.

For the reasons stated, the Court overrules the debtor's objection to turnover and his objection to MILICO defendants' responses.

Also before the Court at this time is the debtor's motion to stay enforcement of the order of June 19, 1991, pending disposition of the debtor's appeal from that order. The Court previously granted the motion of the MILICO defendants to pay over the amounts owing to the trustee under the June 19 order into the registry of the Court in order to protect these defendants from potential liability to the debtor as

a result of their payment to the trustee. In his motion to stay enforcement, the debtor asserts that he is irreparably harmed by the deprivation of these funds. He asserts that any risk resulting from interim payment of the funds to the debtor is minimized by the amount of his postpetition earnings and that this risk could be eliminated altogether by the posting of an appeal bond.

Payment of the funds into the Court's registry is intended to preserve the status quo, as the funds are being held in an interest-bearing account and will be available for payment to either the trustee or the debtor depending upon the outcome of the debtor's appeal. The Court finds, therefore, that the debtor is not being harmed by the interim payment into the Court's registry and denies the debtor's motion for stay of enforcement. Alternatively, the Court will grant the debtor's motion for stay of enforcement in the event the debtor posts an appeal bond of double the amount of potential damages under the Court's order of June 19, 1991. The Court calculates a reasonable amount for such appeal bond to be \$1,000,000, taking into consideration the amounts paid to the debtor prior to the Court's order, the MILICO defendants' representation of amounts that have accrued since that time, and the length of time required before final disposition of the debtor's appeal.

See written order.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: JANUARY 10, 1992